Au Kean Hoe v Persatuan Penduduk D'villa Equestrian

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-2496–10 OF 2012

MOHD HISHAMUDIN, ABDUL AZIZ ABD RAHIM AND MOHAMAD ARIFF JJCA

7 MARCH 2013

Tort — Nuisance — Interference with personal comfort — Construction of guard house and boom gates on public road — Whether presence of structures interfered with appellant's right of access to and from house — Whether inconvenience constituted nuisance — Whether nuisance proven

The appellant was the resident-owner of a house in the D'Villa Equestrian Housing Estate ('the housing estate'), while the respondent was the resident association of the housing estate. The appellant filed a claim against the respondent for nuisance and obstruction. It was the appellant's case that the two boom gates and guard house guarding the entrance and exit to the housing estate were constructed on a public road, contrary to the rules and regulations of the local council and constituted an obstruction. It was an undisputed fact that the residents of the housing estate had unanimously agreed to pay RM200 per month as security and maintenance charges and that they would cease to be a member of the respondent when they stopped making the said payments. The consequences of not being a member of the respondent included the resident of the housing estate being unable to avail himself of the services provided to members of the respondent. When the appellant ceased to be a member of the respondent he suffered the consequences of this decision ie having to open the boom gate himself without the assistance of the security guard on duty and picking up his visitors at the guard house. The plaintiff argued that the presence of the boom gates and guard house interfered with his right to enjoy freedom of access to and from his housing estate. Although the respondent conceded that the boom gates and guard house were constructed on a public road, it was the respondent's contention that both these structures, which had been lawfully erected by the developer, were necessary for the security of the residents in the housing estate. The respondent also submitted that when the appellant purchased the house in the housing estate it was deemed to have accepted the existence of the boom gates and guard house. The trial judge acknowledged that although the appellant had been inconvenienced he was not obstructed or hindered from entering his housing estate. This was the appellant's appeal against that decision on the grounds, inter alia, that the trial judge had erred in deciding that the operation of the boom gates and guard house was reasonable and not a nuisance and in failing to recognise that the

operation of the boom gates and guard house was in contravention of the terms and conditions imposed by the local authority.

Held, dismissing the appeal with costs of RM15,000:

(1) As the appellant had abandoned his claim for the demolition of the boom gates and guard house during the trial before the High Court, the illegality of the boom gates and guard house was a non-issue in this appeal (see para 34).

(2) The two cases cited and relied upon by the appellant would be of no assistance to him in the present case. Unlike those cases, the appellant in the present appeal was not in any way prevented or obstructed from leaving or entering the housing estate except that he had to manually operate the boom gates and could not rely on the services of the guard on duty. Although the appellant had to operate the boom gates himself, that act, as rightly recognised by the trial judge, had only constituted an inconvenience and had not prevented or hindered him from entering or leaving his housing estate. The respondent had not acted unreasonably in directing the security guard not to assist residents who had not paid the security charges. Further, it could not be denied that the presence of the boom gates and the guard house had given the appellant and other residents of the housing estate a sense of security. In the circumstances of the present case, the respondent had not committed any act of nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the housing estate (see paras 41 & 43–45).

(3) The appellant's argument that the respondent had operated the boom gates and the guard house without due regard to the conditions imposed by the local authority had no merit (see para 42).

[Bahasa Malaysia summary

Perayu adalah pemilik penduduk rumah di Estet Perumahan D'Villa Equestrian ('estet perumahan'), sementara responden adalah pertubuhan penduduk estet perumahan tersebut. Perayu memfailkan tuntutan terhadap responden untuk kacau ganggu dan halangan. Adalah kes perayu bahawa dua pagar penyekat dan rumah pengawal yang mengawal masuk dan keluar kepada estet perumahan tersebut didirikan atas jalan awam, bertentangan kaedah-kaedah dan peraturan-peraturan majlis tempatan dan membentuk halangan. Adalah fakta yang tidak dipertikaikan bahawa penduduk-penduduk estet perumahan tersebut telah dengan sebulat suara bersetuju untuk membayar RM200 sebulan sebagai caj-caj keselamatan dan penyelenggaraan dan bahawa mereka akan tamat menjadi ahli responden apabila mereka berhenti membuat bayaran-bayaran tersebut. Akibat daripada tidak menjadi ahli responden termasuk penduduk estet perumahan tersebut tidak mendapat khidmat-khidmat yang diperuntukkan kepada ahli-ahli dalam pertubuhan

responden. Apabila perayu berhenti menjadi ahli responden dia menanggung akibat keputusan ini iaitu kena membuka pagar penyekat dengan sendiri tanpa bantuan pengawal keselamatan yang bertugas dan mengambil tetamu-tetamunya di rumah pengawal. Plaintif berhujah bahawa dengan adanya pagar penyekat dan rumah pengawal menganggu haknya untuk menikmati kebebasan akses pergi dan balik dari estet perumahannya. Walaupun responden bersetuju bahawa pagar-pagar penyekat dan rumah pengawal didirikan atas jalan awam, adalah hujahan responden bahawa kedua-dua struktur ini, yang mana telah didirikan dengan sah oleh pemaju, adalah perlu untuk keselamatan penduduk-penduduk di estet perumahan tersebut. Responden juga berhujah bahawa semasa perayu membeli rumah di estet perumahan tersebut ia dianggap telah menerima kewujudan pagar-pagar penyekat dan rumah pengawal. Hakim perbicaraan menerima bahawa walaupun perayu telah mengalami kesulitan dia tidak disekat atau dihalang daripada memasuki estet perumahannya. Ini adalah rayuan perayu terhadap keputusan tersebut atas alasan, antara lain, bahawa hakim perbicaraan tersilap dalam memutuskan bahawa operasi pagar-pagar penyekat dan rumah pengawal adalah munasabah dan bukan gangguan dan dalam kegagalan untuk menerima bahawa operasi pagar-pagar penyekat dan rumah pengawal adalah bertentangan dengan terma dan syarat yang dkenakan oleh majlis tempatan.

Diputuskan, menolak rayuan dengan kos RM15,000:

(1) Memandangkan perayu telah meninggalkan tuntutannya untuk merobohkan pagar-pagar penyekat dan rumah pengawal semasa perbicaraan di hadapan Mahkamah Tinggi, pagar-pagar penyekat dan rumah pengawal yang menyalahi undang-undang bukan isu dalam rayuan ini (lihat perenggan 34).

(2) Kedua-dua kes yang dirujuk dan digunakan oleh perayu tidak membantunya dalam kes ini. Tidak seperti kes-kes tersebut, perayu dalam rayuan ini tidak dalam apa cara sekalipun dihalang atau disekat daripada meninggalkan dan memasuki estet perumahan kecuali dia terpaksa mengendalikan pagar-pagar penyekat sendiri dan tidak dapat menggunkan khidmat pengawal yang bertugas. Walaupun perayu terpaksa mengendalikan pagar-pagar penyekat dengan sendiri, tindakan itu, seperti yang diterima dengan betul oleh hakim bicar, hanya membentuk kesulitan dan bukan menyekat atau menghalangnya daripada memasuki atau meninggalkan estet perumahannya. Responden tidak bertindak secara tidak munasabah dalam mengarahkan pengawal keselamatan untuk tidak membantu penduduk-penduduk yang tidak membayar caj-caj keselamatan. Selanjutnya, ia tidak dapat dinafikan bahawa kehadiran pagar-pagar penyekat dan rumah pengawal telah memberikan plaintif dan penduduk-penduduk lain estet perumahan rasa selamat. Dalam keadaan kes ini, responden tidak melakukan apa-apa tindakan kacau ganggu dengan mengekalkan pagar-pagar penyekat dan

rumah pengawal atas satu-satunya jalan di jalan masuk estet perumahan tersebut (lihat perenggan 41 & 43–45).

(3) Hujahan perayu bahawa responden telah mengendalikan pagar-pagar penyekat dan rumah pengawal tanpa mengambil kira kepada syarat-syarat yang dikenakan oleh pihak berkuasa tempatan tidak mempunyai merit (lihat perenggan 42).]

Notes

For cases on interference with personal comfort, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1963–1967.

Cases referred to

Robert Chin Kick Chong & Anor v Pernas Otis Elevator Co Sdn Bhd & Ors [1992] 3 CLJ (Rep) 486, HC (distd)

UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals [2007] 6 MLJ 530; [2007] 5 CLJ 489, CA (distd)

Legislation referred to

Societies Act 1966

Street Drainage and Building Act 1974 s 46(1)(a)

Appeal from: Civil Suit 22 NCVC-8–01 of 2012 (High Court, Shah Alam)

K Murali (S N Nair & Partners) for the appellant.
Atma Singh (Dr John with him) (Atma Singh Veriah & Co) for the respondent.

Abdul Aziz Abd Rahim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court at Shah Alam given on 18 September 2012 dismissing the appellant's claim against the respondent for nuisance and obstruction as well as for injunction; and allowing the respondent's counterclaim for damage to the boom gates and for the order restraining the appellant from harassing the committee members of the resident association ('RA') and the security guard.

[2] In this appeal, the appellant will be referred to as the plaintiff and the respondent as the defendant respectively, as the parties were before the High Court.

[3] The plaintiff and his wife are the purchasers and co-owner of a house No 7, Jalan Kenyalang 11/15E, D'Villa Equestrian Housing Estate ('the housing estate'). They purchased the house on 23 November 2006 and moved in on January 2007.

[4] The housing estate was developed by Sunway Damansara Sdn Bhd ('the developer'). There is only one entrance and exit road to the housing estate that is Jalan 11/15. The developer had constructed two boom gates and a guard house on Jalan 11/15 of the housing estate. The developer was responsible for the security and maintenance (including the two boom gates and the guard house) of the housing estate until December 2007.

[5] When the plaintiff and his wife purchased the house in the housing estate, the two boom gates and the guard house were already there and functioning.

[6] The defendant is the RA of the housing estate and it was registered under the Societies Act 1966. The plaintiff was a member of the RA and was its Treasurer from May 2009 to March 2010.

[7] It is a fact that beginning January 2008, the residents of the housing estate were required to pay RM250 per month to the defendant as security and maintenance charges. This amount was later reduced to RM200 per month sometime in August 2009. It is also an undisputed facts that at a meeting held on 21 July 2007, the residents of the housing estate had unanimously agreed that those who do not pay for the security and maintenance charges will have the following consequences:

(a) will raise the drop bar by themselves when entering/exiting;

(b) will pick up their visitors at the guard house;

(c) the guards will not intercom them of their impending visitors;

(d) will not be given car stickers and house gate badges;

(e) in the event the house alarm is triggered off, the guards will not respond to it; and

(f) guards will not attend to their needs when patrolling and during emergencies.

[8] The plaintiff ceased to be a member of the RA sometime in August 2010 and had since stopped paying the maintenance and security charges.

[9] On 25 October 2011, the defendant issued a circular signed by the chairman, the treasurer and the secretary of the RA, notifying the residents that those who have not paid the security and maintenance charges will have to do a self service entrance; that is to say that they will have to open the boom gates themselves without the assistance of the security guard on duty. For a full impact of that circular, the circular is reproduced below:

SELF SERVICE ENTRANCE

Following our RA Committee meeting held on 23 October, we have decided to implement a 'self-service' entrance procedure to those residents who have regularly not been paying their monthly fees like the majority of the cooperative and like-minded residents.

The security guards will be instructed NOT to assist in opening of the boom gate into as well as going out to those vehicles belonging to houses that have adamantly ignored and failed to make their security fees payments.

This practice will take effect from 1 November 2011.

The RA has no choice but to execute such to protect the interest of the majority who have consistently and responsibly paying every quarter without fail. We live in a community designed for gated and guarded that requires common sharing and values. Security, sense of safety, cleanliness, and harmony for all come from the contribution of each one of us — not some of us!

The comforts of security do not come free and the price of our family's safety should not be negotiated.

Please be reminded accordingly.

[10] As found by the learned judge, the dispute in this case arose when the defendant's instruction in the above circular notice was carried out by the security guard at the guard house.

COMPLAINT BY THE PLAINTIFF

[11] The main complaint by the plaintiff to justify his claim for nuisance and obstruction is that the guard house and boom gates are constructed on a public road contrary to the local council rules and regulations. The local council here is the Majlis Bandaraya Petaling Jaya ('MBPJ'). According to the plaintiff, these rules and regulations were communicated to the defendant by MBPJ in a letter dated 11 January 2012 (exh P21). The plaintiff contends that because of the instruction by the defendant in the circular notice, the plaintiff and his family members are forced to manually open the boom gates before entering and exiting the housing estate. The plaintiff also complained that because of the same instruction, he had to receive his visitors and licensees at the guard house before they are allowed to go to the plaintiff's residence or house in the housing estate. The plaintiff argued that all these are against the MBPJ rules and regulations when the latter gave its approval for the construction of the boom gates and the guard house sometime in December 2012.

[12] The plaintiff also contended that the act of the defendant is motivated by the fact that the defendant is trying to force the plaintiff to pay for the maintenance and security charges. The plaintiff argued that when he purchased

A the property with his wife, there were no terms or covenants in the sale and purchase agreement (exh P1) for the payment of any maintenance or security charges to the defendant.

B **[13]** The plaintiff conceded that the boom gates and guard house were already functional when he and his family moved in to the housing estate and when he was the treasurer of the RA. However, the plaintiff submitted that it was not known to him then that the guard house and the boom gates were operating without any approval from MBPJ.

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[14] The plaintiff gave evidence that on the morning of 1 November 2011, his wife was forced to come out of her car and opened the boom gate herself. In order to do so, she had to park her car in the middle of the public road and thereby causing obstruction to other cars coming from behind her car and D those cars were blowing their horns. The plaintiff said, the inconvenience out of the obstruction was unreasonable and unbearable. On another occasion, the plaintiff said when he returned late one afternoon, the security guard refused to open the boom gate for him. He waited for a while to see whether the security guard will open the boom gate; but he was ignored by the guard. Because of the E inconvenience caused by the presence of the boom gates, the plaintiff said he decided that he had every right to clear the obstruction on a public road. The plaintiff then decided to drive through the boom gate by placing his car's carpet in between the boom gate and his car's wind screen and proceeded to drive slowly until the boom gate was sufficiently bend to allow his car to go through.

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[15] The plaintiff also complained that his 15 years old daughter had to walk all the way to the guard house to collect a delivery from McDonald's when the McDonald's delivery man was stopped at the guard house and not allowed to G come his residence to make the delivery.

[16] The plaintiff also complained that the contractor's workers engaged by him were refused entry and accessed at the guard house to go to his house until he himself had to go to the guard house to open the boom gate and escort the H workers in to his residence.

[17] Not happy with the situation, the plaintiff wrote to the chairman of the RA a letter (exh P18) demanding that he put a stop to the illegal actions (regarding the boom gates) or face legal actions. At the same time the plaintiff I also received a copy of D'villa News Flash letter issued to all the residents. The newsletter informed the residents that the plaintiff did not pay the maintenance and the security charges and had damaged the boom gate. The plaintiff lodged a police report (exh P19) against the defendant with regard to the newsletter.

[18] On 8 November 2011, the plaintiff went to MBPJ to see one Puan Hjh Noraini bt Mohd Din who was then the *Penolong Pengarah Kejuruteraan* (Lalu Lintas) MBPJ. The plaintiff was informed by Puan Hjh Noraini that the guard house and the boom gates were not approved by MBPJ.

[19] In the learned judge's judgment the complaints by the plaintiff was summarised in a nutshell as follows:

> The plaintiff contended that the boom gate which is on a public road is an obstruction on his path and by refusing to open the boom gate, the defendant is effectively obstructing the plaintiff and his family from entering their residence; that the boom gate and the guard house were illegal as the defendant's application for the same was only made on 29 November 2011 and the approval from MBPJ was only obtained vide a letter dated 11 January 2012.

THE DEFENCE

[20] In their defence to the plaintiff's claim, the defendant conceded that the guard house and the boom gates were constructed on road 11/15 of the housing estate, which is a public road.

[21] However, the defendant says that the guard house and boom gates were already there and functioning when the plaintiff moved into the housing estate with his family; and the boom gates and the guard house were erected by the developer. The plaintiff who was initially a member of the RA had paid for the security and maintenance charges until he decided to stop becoming a member and accordingly stopped paying for the maintenance and security charges since August 2010. It was also contended that when the plaintiff was elected as treasurer of the RA, the plaintiff helped in collecting the security and maintenance charges.

[22] With regard to the illegality in the construction of the guard house and the boom gates, the defendant said that it had obtained approval from MBPJ.

[23] The defendant also contends that the plaintiff was at no time, prevented from entering and exiting his residence, except that the plaintiff and his family members were inconvenienced in that every time they want to pass through the boom gates they have to manually operate it themselves without the assistance of the security guard on duty at the guard house. It is also the defence of the defendant that when the local council and local planning authority approved the lay out plan for the D'Villa Equestrian housing estate in December 2002, it was approved with the guard house and the parameter wall with all roads ending in *cul-del-sacs*.

[24] It was contended by the defendant that the boom gates and the guard house are for the security of the residents in the housing estate, and that when the plaintiff purchased the house in the housing estate, the plaintiff was deemed to accept the existence of the guard house and the boom gates that provide security to the residents.

[25] In her judgment, the learned judge had summarised the defence by the defendant in the following para of her judgment:

> The defence essentially is that the construction of the guard house and the boom gate was lawfully erected by the developer which sold the houses as a gated and guarded community and that the plaintiff has acquiesced and accepted the guard house and the boom gates.

[26] It is also worth noting that in para 8 of its statement of defence, the defendant had pleaded that the allegations by the plaintiff that the boom gates and the guard house were illegal and had not complied with existing law was an afterthought and was made in bad faith. It was alleged that the plaintiff was vindictive and spiteful in his action. It was pleaded that:

(a) the plaintiff by his conduct and action had not only acquiesced the presence of the boom gates but in fact had accepted their presence;

(b) the plaintiff had, before he resigned as a member of the RA, paid for the security and maintenance charges and knew that the security and maintenance fund has been in existence for more than seven years;

(c) the plaintiff moved into the housing estate because it was a guarded residence;

(d) the plaintiff, while acting as the treasurer of the RA, had collected security and maintenance charges from the residents and sent reminders to the residents to pay;

(e) the plaintiff knew that the RA at its first association meeting on 21 July 2007 had unanimously agreed that those who did not pay for the security and maintenance services:

(i) will raise the drop bar by themselves when entering/exiting;

(ii) will pick up their visitors at the guard house;

(iii) the guards will not intercom them of their impending visitors;

(iv) will not be given car stickers and house gate badges;

(v) in the event the house alarm is triggered off, the guards will not respond to it; and

(vi) the guards will not attend to their needs when patrolling and during emergencies.

(f) the plaintiff had recommended a contractor to repair and replace the boom gates and CMS system and had wanted to carry out the CMS system as late as 9 November 2010 while at the same time stating that he was no longer a member of the RA; and

(g) the plaintiff had purchased stationery from a company in which he was a shareholder and a director without disclosing his interest in the said company.

FINDINGS BY THE HIGH COURT

[27] In her judgment the learned High Court judge found that the layout plan (exh P25) for the housing estate which was approved by the MBPJ way back in 2002 had shown the guard house in the centre of the road No 11/15 with a parameter wall surrounding the entire residential estate. The learned judge was also of the view that though the approved layout plan only shows the guard house not the boom gates, the purpose of having a guard house is to enable the guards station thereat to inspect and allow or not allow any vehicles from coming into the housing estate and this can be more effectively done by having the boom gates. Therefore the learned judge was of the view that the boom gate was not illegally constructed by the developer. The learned judge also found that it is neither unreasonable to direct the guards not to assist residents who had not paid the security charges in operating the boom gates nor there is a real interference with the comfort or convenience of living according to the standards of the average man by having the guard house and the boom gates at the only entry and exit point of the housing estate.

[28] The learned judge however acknowledged that the plaintiff had certainly being inconvenienced, but the learned judge also found that the plaintiff had admitted that he was not at any time being obstructed ie being prevented or hindered from entering his residence.

[29] On the issue of inconvenience to the plaintiff, the learned judge said this in her judgment:

> The choice is the plaintiff's. If he strongly feels that he has been inconvenienced or that his safety and that of his family members is at risk by having to get down from the car to operate the boom gates themselves, then it is not unreasonable to expect the plaintiff to pay for the charges as do all the other residents.

If he feels strongly about not paying for the reason that the money paid is not used (as he alleged) for the purpose it was collected, then the plaintiff will have to bear the inconvenience.

[30] The learned judge also found that the demolition of the guard house and the boom gates would be against the wishes of all the residents save for the plaintiff. In her judgment, the learned judge said that 113 out of 114 residents have given written confirmation (exh D13) that they disagreed and object to any attempt to dismantle the guard house and the boom gates. The learned judge also found that the demolition of the guard house and the boom gates would compromise the residents' safety and would be against the advice of the police contained in a letter from Ketua Balai Polis Kota Damansara (exh D47) dated 30 January 2012. It is also the finding of the High Court that the guard house and the boom gates had been there for the last four years before the plaintiff brought the suit against the defendant. Therefore, the learned judge was of the view that the plaintiff is estopped from challenging the presence of the guard house and the boom gates. It is also the learned High Court judge's finding that the plaintiff never raise any issue on the legality of the guard house and the boom gates until he became dissatisfied with the defendant in relation to some issues including the use of security and maintenance charges for family day's expenses for the residents of the housing estate. The learned judge concluded in her judgment that the plaintiffs claims is purely for his personal satisfaction at the expense of all the other residents who had agreed and confirmed that they wanted the guard house and the boom gates to remain.

[31] With regard to the defendant's counterclaim, the learned judge found that the plaintiff cannot be compelled to become member of the RA if the plaintiff refuses to do so. And in the circumstance of the plaintiff not being a member of the RA, the plaintiff cannot be compelled to pay the security and maintenance charges. However the learned judge found that since the construction of the guard house and the boom gates is not illegal, the plaintiff is liable for the damage done to the boom gates.

THIS APPEAL

[32] In this appeal the plaintiff raised eleven grounds in the memorandum of appeal. However these grounds may be summarised into three main grounds only. The first ground is that the learned judge had erred in failing to give consideration to the relevant laws and conditions imposed by MBPJ in its letter of 22 December 2011 in deciding that the manner the guard house and the boom gates are operated do not cause nuisance to the plaintiff and his family. The second ground is that the learned judge erred in deciding that the manner which the defendant operates the security guard and the boom gates on a public road is reasonable and not a nuisance and does not constitute real

interference with the comfort or convenience of living according to the standards of the average man when the plaintiff and members of his family have to resort to self-service in operating the boom gates each and every time the plaintiff or members of his family want to enter or exit the housing estate; and for that matter each every time the plaintiff's visitors want to come and visit the plaintiff and his family. Thirdly, the learned judge erred in failing to find that the boom gates and the operation of the guard house was in contravention of the terms and conditions imposed by the local authority that is MBPJ; and as such the presence of the guard house and the boom gates had interfered with the plaintiff's right to enjoy freedom of access.

[33] We will start by stating the fact that during the trial before the High Court, the plaintiff had abandoned the claim for the demolition of the guard house and the boom gates. This is because the plaintiff had taken the position that the MBPJ had subsequently granted the approval for the guard house and the boom gates. However the plaintiff insisted that the guard house and boom gates should be removed if the same were being used by the defendant to obstruct and inconvenience the plaintiff and his family. This was clearly stated by the learned judge in her ground of judgment in the paragraph that is reproduced below:

> Hence, during the trial, the plaintiff had taken the position that since MBPJ had approved the guard house and the boom gates, he is not insisting for the guard house and the boom gates to be demolished. Nevertheless, the plaintiff states that if the defendant still persists in using the same to obstruct and inconvenience him and his family, then it should be removed.

[34] Therefore with regard to the illegality of the boom gates and the guard house, it is a non-issue in this appeal. Thus, the only remaining substantial grounds to be determined is whether the presence of the guard house and the boom gates is a nuisance and whether there is a real interference with the comfort or convenience of living according to the standard of the average man.

[35] Before us, the plaintiff argued that the learned judge had wrongly applied the reasonable man test. This is because, it was argued the reasonable man in this case is not a member of the RA. With regard to the reasonable man test, the plaintiff had referred to the case of *Robert Chin Kick Chong & Anor v Pernas Otis Elevator Co Sdn Bhd & Ors* [1992] 3 CLJ (Rep) 486, at p 495, in which the following passage is found:

> The list of acts which can be termed a nuisance cannot be closed. It opens with each new or innovative act which causes harm or annoyance to others. No precise or universal formula is possible but a useful test is what is unreasonable according to the

> ordinary usages of mankind living in a particular society or is there real interferences with the comfort or convenience of living according to the standards of the average man.

[36] We have no issue with the test to be applied in this case as stated in the above passage. But what is nuisance in law? *Clerks & Lindsay on Torts* (15th Ed) at p 1140 classified nuisance into two classes: a public nuisance and a private nuisance. As a general rule an act or omission which interferes with or disturbs or annoys a person in the exercise or enjoyment of a right belonging to him as a member of the public is a public nuisance and if the act or omission only affects the person ownership or occupation of land or of some easement or other right used or enjoyed in connection with land, then it is a private nuisance. The learned authors also have defined whether an act is a nuisance or otherwise as follows:

> Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of committing it, that is whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous so that the question of a nuisance or no nuisance is one of fact.

[37] It is obvious therefore that whether an act or omission is a nuisance or not is a question of fact.

[38] In this case the plaintiff has not indicated whether his complaint was about public or private nuisance. If it is about public nuisance we think that the complaint is baseless. The reason being that, as pointed out by the learned judge in her judgment, out of 114 residents staying in the housing estate only one resident complained that is the plaintiff. In our view therefore, if at all there is a merit in the complaint it is only in relation to the plaintiffs private nuisance. However bearing in mind the definition of an act which constitute nuisance as stated in the above paragraph from *Clerk & Lindsay* on *Torts*, is the act by the defendant putting up the guard house and the boom gates, agreed by all the residents except the plaintiff, a nuisance? The plaintiff relied heavily on the decision in *Robert Chin Kick Chong*'s case to support his contention that it is a nuisance. In our view *Robert Chin Kick Chong*'s case is distinguishable on the facts. That case is about a broken down lifts or elevators and the plaintiffs there had applied to court for injunction directing the defendants to do repair works on the lifts. The plaintiffs in that case were resident-owners of the apartment at the 11th floor of the condominium complex developed by the second defendant. The lifts to the apartments could not be called from the 11th floor because the call button was damaged. To replace the call button and thus enabling the lifts to be called from the 11th floor would cost the owner of the condominium complex RM140. But the fourth defendant in that case, who

was responsible for the management the common property of the condominium, either declined or neglected to approve the replacement of the call button. From the facts of the case it would appear that one of the reasons for the refusal or neglect was because the plaintiffs in that case were in arrears of service charges payment. The learned judge in *Robert Chin Kick Chong*'s case granted the injunction. On the facts, the court there accepted that the broken lifts and the refusal of the owner of the condominium to repair them is a nuisance. However the learned judge in that case was also of the view that the case before him was exceptional; because usually the court would not grant an injunction requiring a defendant to do repairs — see p 494 of the judgment. But, with regard to the plaintiff's contention in *Robert Chin Kick Chong*'s case that the defendants were extortioners trying to force the plaintiffs in that case to pay for the arrears of service charges, the learned judge disagreed. Nevertheless the learned judge did say that the defendant's act did come close to it.

[39] Another reason why the learned judge in *Robert Chin Kick Chong*'s case ruled against the defendants was because under the Building By-Laws 1951 issued under the Sanitary Boards Ordinance 1931 and the Municipal Ordinance published under the authority of the Government of the Colony of North Borneo which is still applicable to Sabah at the material times required that an owner of a building to keep and maintain every lift in 'good order and repair and efficient working order'.

[40] We also agree with the learned judge's view in the present appeal that the case of *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530; [2007] 5 CLJ 489, is of no assistance to the plaintiff's argument that the act of the defendant constitutes nuisance. We are of the view that the learned judge was correct to distinguish *UDA Holdings Bhd*'s case on its facts. In that case the plaintiff had sued UDA Holdings Bhd for the closure of a portion of a road leading to the main entrance of the plaintiff's supermarket and had constructed 76 stalls at the said road. UDA Holdings Bhd had acted in concert with DBKL and the land administrator who is an officer of the Government of Malaysia. DBKL and the Government of Malaysia were also parties to the plaintiff's suit but they are of no relevance at this point of time. The plaintiff in *UDA Holdings Bhd*'s case alleged that the closure of the road was a public nuisance. The respondent in that case was a cooperative society operating a supermarket with customers mainly from its members consisting of 600 individuals members and 50 cooperative societies. The products sold at the supermarket were essentially food stuffs and household goods. The road leading to the main entrance to the supermarket had 35 parking bays. The road proved to be very convenient to the customers of the plaintiff's supermarket for the purposes of loading and unloading passengers and goods to their vehicles. The road was closed to public for five years. As a result, the plaintiff's

supermarket business suffered badly. In *UDA Holdings Bhd*'s case, the Court of Appeal found that there was public nuisance caused by all the three defendants which was actionable at the instance of the plaintiff. The court held that the concerted acts of the defendants had inflicted on the plaintiff in that case, special damage not only in degree but also different in kind in the exercise or enjoyment of its rights and convenience and such special damage was over and above that suffered by members of the public generally as users of the said road and the customers of the plaintiff.

[41] It is obvious that in the two cases cited by the plaintiff in this appeal namely, *Robert Chin Kick Chong*'s case and *UDA Holdings Bhd*'s case, there was no option or alternative given to the plaintiff by the defendants in those cases to alleviate the nuisance which interferes with enjoyment of the plaintiff's rights and convenience. Whereas in the present appeal, the plaintiff was not in any way prevented or obstructed from leaving or entering the housing estate except that the plaintiff has to operate the boom gates manually by himself and cannot rely on the services of the guards on duty like any other residents who have religiously paid their security and maintenance charges as agreed by the members of the RA. The plaintiff himself in his evidence conceded that there was only inconvenience to him but he was never at any time being obstructed or prevented from entering or leaving the housing estate. In other words, his access to his residence and to the outside world were never at any time being jeopardised.

[42] With regard to the plaintiff's argument that the defendant in this case had operated the boom gates and the guard house without due regard to the conditions imposed by the MBPJ in its approval, we are of the view that there is no merit in this argument. The terms and conditions imposed by the MBPJ on the operation of boom gates and guard house in housing estate with a guarded community are contained in a document 'GARIS PANDUAN KOMUNITI BERPENGAWAL (GUARDED COMMUNITY) Dl KAWASAN MAJLIS BANDARAYA PETALING JAYA' (exh P11) which was prepared by Jabatan Perancang Bandar MBPJ and which was approved by the Full Council Meeting on 24 May 2011. The relevant condition imposed by MBPJ for our purpose is contained in a approval letter by MBPJ to the chairman of the RA of the housing estate dated 11 January 2012 (exh P21). The approval letter is re-produced below:

> Ruj.Kami: (03)dlm.MBPJ/040100/T/P23/PJU5/6562/2011
>
> Tarikh: 11 Januari2012
>
> Dato' Mamat Ariffin Abdullah
>
> Pengerusi Persatuan Penduduk D'Villa Equestrian
>
> No 2, Jalan Kenyalang 11/1'5A

PJU 5, Kota Damansara

47610 Petaling Jaya, Selangor.

Tuan,

PERMOHONAN MENDIRIKAN PONDOK PENGAWAL KESELAMATAN DAN MANUAL BOOM GATE DI JALAN KENYALANG 11/5B UNTUK PERSATUAN PENDUDUK D'VILLA EQUESTRIAN, PETALING JAYA

1. Adalah saya dengan hormatnya di arah merujuk kepada perkara tersebut di atas.

2. Dimaklumkan bahawa Mesyuarat Penuh Majlis Bil. 12 Tahun 2011 pada 22 Disember 2011 telah meluluskan permohonan mendirikan pondok pengawal keselamatan dan 'manual boom gate' di Jalan Kenyalang 11/5B untuk Persatuan Penduduk D'villa Equestrian, Petaling Jaya dengan syarat-syarat berikut:

(i) Pemohon dikehendaki mendapatkan kelulusan Lesen Menduduki Sementara (TOL) daripada Pejabat Tanah Daerah bagi tapak pondok pengawal.

(ii) Penghalang 'boom gate' hanya dibenarkan beroperasi mulai jam 12.00 tengah malam sehingga 6.00 pagi.

(iii) Kelulusan penubuhan 'guarded community' akan diberikan pertimbangan secara *setahun ke setahun* selaras dengan kelulusan Lesen Menduduki Sementara (TOL) dan kelulusan Permit Bangunan Sementara. Kelulusan "ini perlu diperbaharui setiap tahun selaras dengan permohonan Lesen Menduduki Sementara (TOL).

(iv) Penghuni yang tidak menyertai skim ini *tidak boleh* dihalang sama sekali memasuki kediaman mereka pada bila-bila masa.

3. Setelah kelulusan TOL diperolehi, pihak tuan dikehendaki berurusan dengan Jabatan Kawalan Bangunan MBPJ bagi mendapatkan kelulusan permit bagi pondok pengawal.

Sekian, terima kasih.

'KEJUJURAN DAN KETEKUNAN'

Saya yang menurut perintah

sgd

(SHARIPAH MARHAINI BINTI SYED ALI)

Pengarah,

Jabatan Perancangan Pembangunan

bp Datuk Bandar

Majlis Bandaraya Petaling Jaya

(marhaini@mbpj.gov.my)

sk

(1) Pengarah,

Jabatan Kejuruteraan

Majlis Bandaraya Petaling Jaya

(2) Pengarah

Jabatan Kawalan Bangunan

Majlis Bandaraya Petaling Jaya

(3) Pengarah

Jabatan Penguatkuasaan dan Keselamatan

Majlis Bandaraya Petaling Jaya

[43] The plaintiff's complaint in respect of the conditions imposed by the MBPJ is that the defendant had been operating the boom gates 24 hours, whereas in para 2(ii) of the approval letter by MBPJ the boom gates are only permitted to be in operation from 12am until 6am. Though we think that the plaintiff may have an argument in his favour on this point, we are also mindful of the matters that need to be taken into consideration as stated in the passage by *Clerks and Lindsay on Torts* cited earlier in this judgment in determining whether an act constitute a nuisance or otherwise. In this regard, we have given consideration to several undisputed facts in this case. Firstly, all the residents of the housing estate (except for the plaintiff) had agreed that the boom gates and the guard house are to remain. Secondly, the police in their letter to the chairman of the defendant dated 30 January 2012 had advised against the demolition of the guard house and the boom gates on the ground that such demolition would compromise the residents' safety. Thirdly, the plaintiff in cross-examination had said that he accepted the presence of the guard house and the boom gates and that their presence provides security to the residents and their families 24 hours a day. The plaintiff also in his examination-in-chief had said that the housing estate is a very safe place by reason of having the guard house and the boom gates, and the walls surrounding it. Thus, it cannot be denied that the presence of the guard house and the boom gates have given the plaintiff and the other residents of the housing estate a sense of security which allows them to have a peaceful sleep at night.

[44] The plaintiff also contended that the boom gates and the guard house is a nuisance because it is an obstruction in a public place and therefore are in contravention of s 46(1)(a) of the Street Drainage and Building Act 1974. That section makes it an offence for any person who erects or maintains obstruction in any public place. However on the facts and in the circumstances of this case, we are unable to agree with the contention by the plaintiff. The learned judge in her judgment had found that though the plaintiff had certainly been inconvenienced by the presence of the guard house and the boom gates, the

plaintiff has not at any time been obstructed ie being prevented or hindered from entering or leaving his residence. The learned judge went further to say that being inconvenienced and being obstructed are entirely two different circumstances and scenarios. We agree with this view by the learned judge. Furthermore, the obstruction complained by the plaintiff in this case is not of the same class or category as the obstruction caused by the closure of the public road leading to the main entrance of the supermarket in *UDA Holdings Bhd*'s case.

[45] For the above reasons, we agree with the conclusion and finding of the learned judge in this case, that is neither unreasonable to direct the guards not to assist residents who had not paid the security charges especially when all residents (except the plaintiff) had agreed to adhere to the notice of self-service entrance and had paid for the fees upon receipt of the notice nor there is a real interference with the comfort or convenience of living according to the standard of average man by having the guard house and the boom gates at the housing estate. We are of the view that the defendant have not committed any act of nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the housing estate in the circumstances.

[46] Accordingly, the appeal is dismissed with costs of RM15,000 to the defendant/respondent and the deposit is refunded to the plaintiff/appellant. There is no cross-appeal by the defendant/respondent on the counter claim. Therefore, the High Court's decision on the dismissal of plaintiff's/appellant's claim and in allowing the defendant's/respondent's counterclaim is hereby affirmed.

Appeal dismissed with costs of RM15,000.

Reported by Kohila Nesan